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Small Entity Compliance Guide

Auction No. 83 Translator Dismissal Policy

Fifth Order on Reconsideration

FCC 12-144

MM Docket No. 99-25

MB Docket No. 07-172

RM-11338

Released: December 4, 2012

This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—comply with the new rules adopted in the above-referenced FCC rulemaking docket(s). This Guide is not intended to replace the rules and, therefore, final authority rests solely with the rules. Although we have attempted to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. This Guide may, perhaps, not apply in a particular situation based upon the circumstances, and the FCC retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be based on the statute and regulations.

In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide may be considered as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the FCC will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may decide to revise this Guide without public notice to reflect changes in the FCC's approach to implementing a rule, or to clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the FCC's Consumer Center:

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Objectives of the proceeding

On March 19, 2012, the Commission adopted the *Fourth Report and Order and Third Order on Reconsideration (Fourth Report and Order)* in the low power FM (LPFM) proceeding. The Commission proposed to facilitate the processing of the 6,500 FM translator applications then-remaining from the 2003 Auction No. 83 filing window by imposing on applicants that filed in that window a national cap of 50 applications and a market-based¹ cap of one application per applicant per market for markets identified in Appendix A to the *Fourth Report and Order* (“Appendix A Markets”).² Translator applicants with more than 50 pending applications and/or more than one pending application in the identified Appendix A Markets were required to comply with these limits by filing a letter requesting the dismissal of applications that exceed the limits.

In the *Fifth Order on Reconsideration*, the Commission modified the applications caps in response to several petitions for reconsideration filed against the *Fourth Report and Order*. Specifically, the *Fifth Order on Reconsideration* revises the applications caps and allows (but does not require) applicants to pursue up to 70 applications nationally provided that: (a) no more than 50 applications are in Appendix A Markets; (b) those applications that are not in Appendix A Markets: (i) must protect from interference at least one potential LPFM channel at the proposed transmitter site; (ii) cannot overlap with the contour of any other pending translator application or authorization held by that applicant; and (iii) granted translator authorizations in non-Appendix A markets cannot be moved within the first four years of operation unless the 60 dBu contour at the new location overlaps with the 60 dBu contour proposed in the application as of the release date of the *Fifth Order on Reconsideration*.³ The translator policy is applicant-specific and does not require applicants to determine if their applications overlap or interfere with pending applications or authorizations held by other parties.

The *Fifth Order on Reconsideration* also allows (but does not require) translator applicants to prosecute up to 3 translator applications in Appendix A Markets, rather than only 1 application, subject to the following conditions: (a) the 60 dBu of the proposed translator station may not overlap the 60 dBu contour of any other translator application filed by that applicant or translator authorization held by that applicant, as of the date of the release of the *Fifth Order on Reconsideration*; and (b) the proposed translator station cannot preclude approval of a future LPFM application in the studied grid⁴ for that market, under the processing policy delineated in Section II.B of the *Fourth Report and Order*,⁵ or at the proposed out of grid transmitter site.

Rules That the Commission Amended

- The *Fourth Report and Order* adopted a market-specific, spectrum availability-based translator application processing policy. The *Fifth Order on Reconsideration* slightly revises this policy by increasing the number of applications that applicants can pursue both nationally and in Appendix A Markets, subject to certain conditions.

¹ The “market-based” approach outlined in *Fourth Report and Order* and *Fifth Order on Reconsideration* relies on radio markets as defined by Arbitron, a consumer research company that collects listener data on radio audiences.

² “Appendix A Markets” are the top 150 Arbitron markets and 6 additional markets where 4 or more translator applications from Auction 83 are pending

³ These conditions apply to non-Appendix A Markets only if an applicant chooses to prosecute more than 50 applications nationally.

⁴ The Media Bureau studied all top 150 radio markets, as defined by Arbitron, and smaller markets where more than four translator applications are pending. It centered a thirty-minute latitude by thirty-minute longitude grid over the center-city coordinates of each studied market. Each grid consisted of 961 points – 31 points running east/west by 31 points running north/south. The Bureau analyzed each of the 100 FM channels (88.1 MHz – 107.9 MHz) at each grid point to determine whether any channels remained available for future LPFM stations at that location. See *Fourth Report and Order*, ¶ 28-29.

⁵ *Fourth Report and Order*, ¶ 28-49.

- Specifically, the *Fifth Order on Reconsideration*, sets forth a processing policy in which the Commission will impose a national application cap of 70 applications, provided (a) no more than 50 are in the Appendix A Markets, and (b) those applications that are not in Appendix A markets meet the conditions described above. It also imposes a market-based cap of three applications per market for Appendix A Markets, provided that the applications meet the conditions described above. It directs the Media Bureau to issue a Public Notice asking applicants affected by the caps to identify applications for continued processing, consistent with these limits and to submit showings, on or before the deadline identified in the Public Notice, that demonstrate that the applications are in compliance with the conditions set forth in the order, as described above. After applicants identify those applications they wish to pursue and submit the required showings, or after the Bureau applies default application selection procedures⁶ in cases where the applicant fails to submit a timely selection/dismissal letter or files a defective letter, the Bureau will process the remaining applications to determine whether they can be granted
- Applicants with proposals remaining in Appendix A Markets after the Bureau dismisses applications for which the applicant does not seek further processing, or after the Bureau applies default dismissal procedures, will also be given one opportunity to modify their proposals to eliminate all preclusive impacts on certain protected LPFM channel/point combinations. An application will be considered to have a preclusive impact if authorization of the requested translator would prevent an LPFM station from operating on a given channel in a given market.⁷ Applications that conflict with protected channel/point combinations (assessments of LPFM licensing opportunities at a given location at each individual FM channel) and that are not amended to eliminate all such conflicts will be dismissed. Applicants with proposals remaining in Appendix A Markets after the Bureau dismisses applications for which the applicant does not seek further processing, or after the Bureau applies default dismissal procedures, will also be given one opportunity to modify their proposals to eliminate all preclusive impacts on certain protected LPFM channel/point combinations.

Impact on Small Business

The changes in the *Fifth Order on Reconsideration* benefit small entities by enabling them to prosecute more FM translator applications, while preserving future LPFM filing opportunities for small entities. The *Fifth Order on Reconsideration* also benefits small entities because it protects the integrity of the broadcast application licensing system by dismissing applications that were likely filed for speculative reasons and by preventing trafficking of unbuilt construction permits. The *Fifth Order on Reconsideration* requires any applicant seeking to prosecute more than one FM translator application in a market and/or more than 50 applications nationally to show that the applications satisfy conditions identified in the order,⁸ but these conditions are intended to preserve LPFM filing opportunities and improve diversity and competition in local radio markets. The order rejects additional suggested conditions meant to deter the trafficking of construction permits (such as conditions on those permits) that would not have offered such benefits. Specifically, the Commission rejected those suggested conditions because they could be easily circumvented

⁶ In the event that an applicant does not timely comply with these dismissal procedures or submits a deficient showing, the staff will (a) first apply the national cap, retaining on file the first 70 filed applications and dismissing (1) those Appendix A applications within that group of 70 applications that were filed after the first 50 Appendix A applications, and (2) those applications outside the Appendix A markets for which an adequate showing pursuant to paragraph 41 has not been submitted, and (b) then dismiss all but the first filed application by that applicant in each of the markets identified in Appendix A.

⁷ The spectrum availability analysis program and data files used by the Commission to identify within-the-grid protected channel/point combinations are available at http://www.fcc.gov/Bureaus/MB/Databases/source_code/lpfm/lpfm6.20121206.zip. Protected channel/point combinations consist of all those combinations identified by this program and the CDBS records used to generate the final versions of Appendices A and B shortly prior the adoption of the *Fourth Report and Order*.

⁸ Fifth Order on Reconsideration and Sixth Report and Order, FCC 12-144, ¶¶ 58-59 (2012).

and would have limited competition in spectrum limited markets without providing a countervailing benefit either to translator applicants or LPFM applicants. In addition, the suggested conditions would have been unduly resource-intensive because they would have required the staff to ensure compliance through lengthy investigations and could delay the processing of translator applications. Adoption of the application caps, as modified in the *Fifth Order on Reconsideration*, benefits small entities because it will allow the Commission to quickly act on applications by small entities that have been pending for more than eight years and to open an LPFM application window for small entities in the near future.

Steps a Small Entity Must Take to Comply with the Translator Dismissal Policy

Auction No. 83 translator applicants must comply with the dismissal procedures in the following manner:

- All parties affected by the national or market caps must identify their pending applications for which they seek further Commission processing, and demonstrate that they comply with the conditions set forth in the *Fifth Order on Reconsideration*. If an applicant fails to submit a timely letter identifying those pending applications for which the party seeks further processing, or if a party submits a timely letter that contains defective showings or that exceeds the caps, the Bureau will apply default dismissal procedures that may result in dismissal of one or more applications that a party identified for further processing.
- Parties with applications in the Appendix A Markets subsequently must file amendments either demonstrating that their applications will not preclude any LPFM channel/point combination identified in the grid studies or eliminating any preclusive impacts on protected LPFM channel/point combinations. Additionally, a translator applicant in a top 50 Appendix A Market proposing facilities outside the studied 31x31 grid also will need to demonstrate either that no LPFM station could be licensed at the proposed transmitter site or, if an LPFM station could be licensed at the site, that an additional channel remains available for a future LPFM station at the same site (“Top 50 Market Preclusion Showing”).⁹ This will ensure that, assuming grant of the pending translator applications, there will be opportunities for licensing LPFM stations outside the most densely populated areas of the markets. Applications that conflict with protected channel/point combinations or fail to make such a Top 50 Market Preclusion Showing and that are not amended to come into compliance with these requirements will be dismissed.

Recordkeeping and Other Compliance Requirements

In the *Fifth Order on Reconsideration*, the Commission requires Auction No. 83 applicants to identify which applications they wish to preserve to come into compliance with the national and market-based caps, and to submit showings demonstrating that their selected applications comply with the conditions set forth in the order, in a timely letter or email.

Weblinks

- The *Fourth Report and Order and Third Order on Reconsideration*; FCC 12-29, adopted and released March 19, 2012.
http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0320/FCC-12-29A1.pdf
- The *Fifth Order on Reconsideration and Sixth Report and Order*; FCC 12-144, adopted November 30, 2012, and released December 4, 2012.
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-144A1.pdf

⁹ Fourth Report and Order, FCC 12-29, ¶ 49.